Due service and receipt of a copy of the within is hereby admitted this_____ day of March, 1938.

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*Attorney for*_____

Supreme Court of the United States

No. 544.

THE UNITED STATES OF AMERICA,

vs.

EDWARD H. MARXEN, TRUSTEE OF MONTEREY BREWING COMPANY, A CORPORATION,

Bankrupt.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR TRUSTEE, *AMICUS CURIAE.*

HARRY LOEB MOSTOW,
Amicus Curiae.

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BRIEF FOR TRUSTEE, *AMICUS CURIAE*.

Statement.

This brief is limited to a discussion of the question as to whether the Federal Housing Administrator is entitled to preferential treatment in the payment of claims filed by him in bankruptcy proceedings either by virtue of statutory enactment or sovereign prerogative.

This brief is submitted *amicus curiae* by the attorney for John F. Burke, the trustee in bankruptcy of Henry Miller, Bankrupt, which bankruptcy proceeding is pending in the District Court of the United States for the Southern District of New York.

In that case a similar claim was filed by the Federal Housing Administrator making the same claim to priority as is made in the case before this court. The trustee

objected and moved to have the claim denied priority and allowed as a general one.

The Referee over-ruled the trustee's objection and allowed the claim as a priority claim. On review by the District Court of the United States, the Honorable Robert P. Patterson reversed the Referee and denied the claim priority and allowed it as a general claim. Judge Patterson, in his opinion (reported 25 Fed. Sup. 336), said:

> "The referee held that a claim by the Federal Housing Administrator based on a promissory note made by the bankrupt and acquired by the Administrator after bankruptcy was entitled to priority over general claims. The trustee in bankruptcy asks a review of the ruling.
>
> At the time when the petition in bankruptcy was filed, August 1, 1936, the bankrupt was indebted to National City Bank in the amount of $1,477, the unpaid balance of a negotiable promissory note covering a loan made by the bank for housing improvement. The bank was insured against loss on notes of this character by the Federal Housing Administrator, to the extent permitted by the National Housing Act. Proof of claim was filed by the bank. Later the Administrator reimbursed the bank and on October 14, 1936, took an assignment of the note. The bank's claim having been withdrawn, the Administrator on February 20, 1937, filed proof of claim against the bankrupt estate, purporting to act in behalf of the United States and claiming priority over general creditors. The trustee in bankruptcy made objection to the priority, but the referee overruled his objection, holding that the claim was entitled to priority.
>
> The claimed priority is based on section 64 (b) (7) of the Bankruptcy Act (11 U. S. C. A., section 104

[b] [7]), giving priority to 'debts owing to any person who by the laws of the States or the United States is entitled to priority,' the word 'person' to include the United States itself, and on section 3466 of the Revised Statutes (31 U. S. C. A., section 131), to the effect that debts due the United States shall have priority in cases where the debtor is insolvent. A debt owing to the United States has priority under these statutes. *United States* v. *Kaplan*, 74 Fed. 2nd, 664 (C. C. A. 2). The referee made an analysis of the National Housing Act and came to the conclusion that a debt owing to the Federal Housing Administrator is a debt owing to the United States. The soundness of this conclusion may be passed. Even if it be sound, the claim held by the Administrator is not one entitled to priority.

The decisive fact in the case is that the bankrupt did not owe a debt to the Federal Housing Administrator at the time when the petition in bankruptcy was filed or at any earlier time. The claim in question was then a debt owing by him to National City Bank, a simple debt that did not rate priority under the Bankruptcy Act. The passing of the claim to the Federal Housing Administrator by assignment months after the petition in bankruptcy was filed did not promote it from the ranks to a position of leadership. The rights of creditors both against the bankrupt and among themselves are fixed as of the time when the petition is filed. See *White* v. *Stump*, 266 U. S. 310, 313. The substantive right of a creditor to share in a bankrupt estate to any extent depends on the status of his claim at the time when the petition in bankruptcy was filed. *Zavelo* v. *Reeves*, 227 U. S. 625; *Williams* v. *United States Fidelity & Guaranty Co.*, 236 U. S. 549. So too the right of a

creditor to priority over other creditors in the distribution of an estate depends on the situation existing when the petition was filed. *In re Winfield Mfg. Co.*, 140 Fed. 185 (D. C. Pa.). If the claim was one not entitled to priority at that time, a later event will not confer priority. *In re C. H. Earle, Inc.*, 2 Fed. Supp. 15 (D. C. N. Y.), affirmed 65 Fed. 2nd, 1013 (C. C. A. 2), certiorari denied 290 U. S. 674. See also *In re Gasteiger & Co.*, 25 Fed. 2nd, 642 (C. C. A. 2); *In re Photo Electrotype Co.*, 155 Fed. 684 (D. C. N. Y.); *In re Waverly Typewriter* (1898), 1 Ch. 699. Were the rule otherwise the United States or a state might buy up claims of mere general creditors after bankruptcy and collect in full, to the ruin of the other creditors. The assignment of the bankrupt's note by the bank to the Federal Housing Administrator after the petition in bankruptcy was filed did not disrupt the equality among creditors prevailing at the time of petition filed. The claim should not have been accorded priority.

Federal Housing Administrator v. *Moore*, 90 Fed. 2nd, 32 (C. C. A. 9), presented the same facts as thos in this case. Priority was denied. In *Wagner* v. *McDonald*, 96 Fed. 2nd, 273 (C. C. A. 8), relied on by the referee, the notes had been assigned to the Administrator prior to the maker's bankruptcy; the decision that the notes had a prior position because they were in effect held by the United States does not touch the present case. The order granting priority will be reversed and the claim allowed as a general one."

The Federal Housing Administrator appealed to the United States Circuit Court of Appeals for the Second Circuit from the order of Judge Patterson denying priority to the administrator's claim. On February 7th, 1939,

the United States Circuit Court of Appeals for the Second Circuit adjourned the hearing of the appeal pending the determination of the question certified in this case.

The questions as to whether the Federal Housing Administrator had a provable claim at the time of the filing of the petition and as to what rights the administrator acquired by virtue of his assignment from the bank, subsequent to the time of the filing of the petition in bankruptcy, are not touched upon in this brief except insofar as these matters are discussed in the opinion of Judge Patterson quoted on pages 2 to 4 of this brief.

POINT ONE.

The Federal Housing Administrator is not entitled to priority in the payment of claims filed by him in bankruptcy proceedings by virtue of the National Housing Act nor by sovereign prerogative.

The National Housing Act, Sections 1 to 6 (12 U. S. C. A., Sections 1702-1706) (set forth in the government's brief), which was enacted in June, 1934, indicates that the Federal Housing Administration was created to aid private business and not to perform any of the essential functions of government.

Section 1703 of the National Housing Act sets forth the purposes of the statute as follows:

> "(a) The Administrator is authorized and empowered, upon such terms and conditions as he may prescribe, to insure banks, trust companies, personal finance companies, mortgage companies, building and loan associations, installment lending companies, and other such financial institutions, which the Administrator finds to be qualified by experience or facilities

and approves as eligible for credit insurance, against losses which they may sustain as a result of loans and advances of credit, and purchases of obligations representing loans and advances of credit, made by them on and after April 1, 1936, and prior to April 1, 1937, * * *."

There is no sound distinction betwen the purposes of the National Housing Act, which created an agency called a Federal Housing Administration, to engage in private business and exercise all of the powers and functions of a body corporate, and the creation by the government of the Reconstruction Finance Corporation.

The purposes of the Reconstruction Finance Corporation are set forth in that Act (15 U. S. C. A., Section 605) as follows:

"To aid in financing agriculture, commerce, and industry, including facilitating the exportation of agricultural and other products, the Corporation is authorized and empowered to make loans, upon such terms and conditions not inconsistent with this chapter as it may determine, to any bank, savings bank, trust company, building and loan association, insurance company, mortgage-loan company, credit union, Federal land bank, joint-stock land bank, Federal intermediate credit bank, agricultural credit corporation, livestock credit corporation, organized under the laws of any State or of the United States, including loans secured by the assets of any bank, savings bank, or building and loan association that is closed, or in process of liquidation to aid in the reorganization or liquidation of such bank or building and loan associations, upon application of the receiver or liquidating agent of such bank or building and loan association, and any receiver of any national

bank is hereby authorized to contract for such loans and to pledge any assets of the bank for securing the same."

The National Housing Act, in effect, set up an entity separate and distinct from the government. Its functions were non-governmental.

The Reconstruction Finance Corporation obtained its funds from the Treasurer of the United States (15 U. S. C. A., Section 602):

> "The corporation shall have capital stock of $500,000,000, subscribed by the United States of America, payment for which shall be subject to call in whole or in part by the board of directors of the corporation."

By the National Housing Act the Reconstruction Finance Corporation was directed to supply the Federal Housing Administrator with funds (12 U. S. C. A., Sec. 1705):

> "For the purposes of carrying out the provisions of this title and titles II and III of this chapter, the Reconstruction Finance Corporation shall make available to the Administrator such funds as he may deem necessary, and the amount of notes, debentures, bonds, or other such obligations which the Corporation is authorized and empowered to have outstanding at any one time under existing law is hereby increased by an amount sufficient to provide such funds: * * *."

The purposes and functions of the Federal Housing Administration are analogous to the purposes and functions of the Reconstruction Finance Corporation. The difference is in name and scope only. Neither of the creating statutes grants priority treatment in bankruptcy proceedings.

This court held in *Continental Illinois Nat. Bank & Trust Co. of Chicago* v. *Chicago, R. I. & P. Ry. Co., et al.*, 294 U. S. 648 (1935), that the Reconstruction Finance Corporation was not entitled to preferential treatment in bankruptcy proceedings, in the absence of express language in the statute which created the Reconstruction Finance Corporation.

In *Continental Illinois Nat. Bank & Trust Co. of Chicago* v. *Chicago, R. I. & P. Ry Co., et al.*, 294 U. S. 648, 684, Mr. Justice Sutherland said:

> "The Reconstruction Finance Corporation Act creates a corporation and vests it with designated powers. Its entire stock is subscribed by the government, but it is none the less a corporation, limited by its charter and by the general law. The act does not give it greater rights as to the enforcement of its outstanding credits than are enjoyed by other persons or corporations in the event of proceedings under the Bankruptcy Act. The provisions and principles of enforcement of the Bankruptcy Act, including section 77, are binding upon the Reconstruction Finance Corporation, in the absence of some pertinent statutory exception, as they are upon other corporations. We are unable to find such an exception * * *. What is given to the lender in either event is a remedy which, when subject to the control of the bankruptcy court under given circumstances in the one case, is equally so in the other."

Nor can the Federal Housing Administrator claim priority by virtue of sovereign prerogative since the claim does not arise by virtue of a statute which seeks to raise revenue for the government.

In *Price* v. *United States*, 269 U. S. 492, 499 (1925), Mr. Justice Butler said:

> "The claim of the United States does not rest upon any sovereign prerogative; but the priority statutes were enacted to advance the same public policy which governs in the cases of royal prerogative; that is, to secure adequate public revenue to sustain the public burdens."

In *Davis* v. *Pringle*, 268 U. S. 315, 318 (1925), the late Mr. Justice Holmes said:

> "Public opinion as to the peculiar rights and preferences due to the sovereign has changed. We agree with the view of this point taken by the Chief Justice and Justices Van Devanter and Clarke in *United States Shipping Board Emergency Fleet Corporation* v. *Wood*, 258 U. S. 549, 574 * * *. The priority claimed by the United States is not given to it by the law."

In *Mellon* v. *Michigan Trust Co.*, 271 U. S. 236 (1926), this court held that although the United States, in taking over and operating railroads, acted in sovereign capacity, rights of Director General of Railroads as to priority of claims arising out of operations rests on statutory provisions and not on sovereign prerogative. The Director General was not entitled to priority in insolvency proceedings under Rev. Stat. Sec. 3466. Mr. Justice McReynolds cited and relied on *Davis* v. *Pringle*, 268 U. S. 315, and *Price* v. *United States*, 269 U. S. 492, which cases rejected the principle of priority by virtue of sovereignty enunciated in the decisions of this court in *Lewis* v. *United States*, 92 U. S. 618 and *United States* v. *Fisher*, 2 Cranch. 618.

This court denied certiorari, 302 U. S. 687, in the case of *Home Owners' Loan Corporation* v. *Central Market, Inc.*, 132 Nebraska 380, wherein it was held that the

Home Owners' Loan Corporation was created to provide emergency relief to home owners in refinancing mortgages and that the Home Owners' Loan Corporation does not have powers of either executive, judicial or legislative branches of government. It was held that it is not entitled to immunity from civil process and is subject to the same liabilities as other corporations similarly employed.

The Federal Housing Administration is in the business of insuring credits, and without questioning its beneficent motive, it is, nevertheless, engaged in a private endeavor.

This court has held that when the United States enters into commercial business, it abandons its sovereign capacity and is to be treatd like any other corporation.

United States Shipping Board v. *Wood*, 258 U. S. 549.

The provisions of the statute indicate an intention to give to private business the benefits conferred without reservation of special rights against those whom the law seeks to assist.

It could not have been the intention of the United States to aid private business with one hand to the extent of one hundred million dollars and to take for itself with the other hand a priority in the payment of its claims in bankruptcy proceedings against private business.

Gillen vs. *Home Owners' Loan Corporation*, 255 App. Div. (N. Y.) 631.

By the original Act itself, the administrator could appoint and compensate assistants without regard to the provisions of other laws * * * delegate the powers and functions conferred upon him * * * make expenditures * * * as are necessary * * * without regard to any other provisions of law governing the expenditure of public

funds * * * could sue or be sued in his official capacity (Section 1702).

The amendments to the National Housing Act, enacted by Congress on April 17th, 1936 (12 U. S. C. A., Section 1703 [c] and [e]), uniformly indicated an intention to confer no special benefits upon the Federal Housing Administrator and excluded the administrator from the operation of other laws generally.

Section 1703 (c):

> "Notwithstanding any other provisions of law, the Administrator shall have the powers, * * * to collect or compromise all obligations assigned to or held by him * * *."

Section 1703 (e):

> "The Administrator is authorized to waive compliance with regulations * * * with respect to the interest and maturity of and the terms, conditions, and restrictions under which loans, * * * may be insured * * *."

CONCLUSION.

The question certified to this Court by the United States Circuit Court of Appeals for the Ninth Circuit should be answered in the negative.

Respectfully submitted,

HARRY LOEB MOSTOW,
Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 544.—October Term, 1938.

The United States of America. *vs.* Edward H. Marxen, Trustee of Monterey Brewing Company, A Corporation, Bankrupt.	On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

[May 15, 1939.]

Mr. Justice Reed delivered the opinion of the Court.

The case is here on certificate from the Circuit Court of Appeals for the Ninth Circuit with a request for instructions needed in a pending cause. Sec. 239, Jud. Code, 28 U. S. C. § 346. The following facts are stated: On August 10, 1934, the Federal Housing Administrator issued a policy of insurance, under the provisions of the National Housing Act, Title 1, Sec. 2,[1] to the California Bank, a banking corporation. On January 2, 1936, the California Bank, under the protection of this policy, made a loan to the Monterey Brewing Company. The company paid part of the indebtedness but defaulted on the balance on February 2, 1937. On April 5, 1937, it filed a petition in bankruptcy and was adjudicated a bankrupt. Under the insurance contract the bank had to wait until 60 days after default before making claim upon the Administrator. The 60 days expired two days before bankruptcy of the company. The bank, however, did not present its claim to the Administrator until July 3, 1937; the latter paid August 4, 1937; by draft drawn on the Treasury of the United States; the bank assigned the note to the "United States of America." Later the Administrator filed a claim upon the note in the name of the United States of America.

[1] "Sec. 2. The Administrator is authorized and empowered, upon such terms and conditions as he may prescribe, to insure banks . . . which are approved by him as eligible for credit insurance, against losses which they may sustain as a result of loans and advances of credit, and purchases of obligations representing loans and advances of credit, made by them . . . for the purpose of financing alterations, repairs, and improvements upon real property. In no case shall the insurance granted by the Administrator under this section to any such financial institution exceed 20 per centum of the total amount of the loans, advances of credit, and purchases made by such financial institution for such purpose . . ." Act of June 27, 1934, c. 847, 48 Stat. 1246.

The referee allowed it as a general claim only. The district court approved. *In re Monterey Brewing Co.*, 24 F. Supp. 463. On the appeal to the circuit court of appeals the following question, decisive of the controversy,[2] was certified:

"Where, prior to the filing of a petition for and adjudication in bankruptcy of the maker of a promissory note payable to a bank, the Federal Housing Administrator, under the provisions of the National Housing Act, insured the payee bank against the nonpayment of the note by its maker, upon which note the maker became in default more than sixty days prior to said filing and adjudication, and upon demand of the insured bank made after the adjudication, the Federal Housing Administrator paid to the bank its claim arising from such default, and procured an assignment to the United States of the claim of the insured bank against the bankrupt, which claim had not been presented or proved in bankruptcy by the insured bank, and presented such claim in the name of the United States to the trustee in bankruptcy having before him other allowed claims against the bankrupt, is such claim entitled to priority over such other claims under sec. 3466 of the Revised Statutes (31 U. S. C. A. § 191) by reason of the provisions of sec. 64(b)(7) [11 U. S. C. A. § 104(b)(7)]."

Section 64(b)(7) conferred priority upon "debts owing to any person who by the laws of . . . the United States is entitled to priority: *Provided*, that the term 'person' . . . shall include . . . the United States . . . ."[3] Section 3466 of the Revised Statutes, the basis for the claimed priority, provides that "Whenever any person indebted to the United States is insolvent . . . the debts due to the United States shall be first satisfied; and the priority hereby established shall extend . . . to cases in which an act of bankruptcy is committed."

Altnough an amendment of the National Housing Act authorized the Administrator to sue and be sued in any court of competent jurisdiction, State or Federal,[4] it is not necessary in answering the present certificate to determine whether by this addition the Congress intended to give the Administrator the status of a corporation or other entity distinct from the United States and by such status, to confer on or withhold from claims of the Federal Housing

[2] United States v. Mayer, 235 U. S. 55, 66; cf. Wheeler Lumber Co. v. United States, 281 U. S. 572, 577; Indian Motocycle Co. v. United States, 283 U. S. 570, 573.

[3] Act of May 27, 1926, c. 406, 44 Stat. 667; 11 U. S. C. § 104(b)(7). This section has been amended by the Act of June 22, 1938, c. 575, § 64, 52 Stat. 874.

[4] Act of August 23, 1935, c. 614, § 344(a), 49 Stat. 722.

Administration against bankrupts the advantages of section 3466.[5] We can deal only with a claim of the Federal Housing Administration assigned to the United States after the adjudication in bankruptcy of the obligor. It is assumed that such a claim belongs to and is made by the United States.[6]

Before considering the applicability of Section 3466 to claims of the United States acquired after the bankruptcy of the obligor, we must examine the contention of the Government that it possessed a provable claim at the time the petition in bankruptcy was filed. This assertion predicates an agreement, express or implied, by the obligor to indemnify the Government for any loss it may sustain by reason of its insurance of the bank. The question certified contains nothing as to the contract of insurance except that it was under the provisions of the National Housing Act and "insured the payee bank against the non-payment of the note by its maker." The section of that act, quoted above, does not indicate any privity between the bankrupt maker and the Government based upon the insurance contract. Even if we accept as accurate the statement in the certificate that the Administration insured against the non-payment of this note,[7] there is nothing in the record to connect the maker with the insurance. The Government attempts to fill in the facts lacking in the certification by printing in its brief a regulation of the Federal Housing Administration, Number 10 of July 15, 1935,[8] and the

[5] The purpose of the amendment was said to be "clarifying." Sen. Rep. No. 1007 on H. R. 7617, 74th Congress, 1st Session, p. 24. The House Report merely stated its substance. H. R. Rep. No. 1822 on H. R. 7617, 74th Congress, 1st Session, p. 57. The Congressional Record is silent on this clause of the Banking Act of 1935.

A corporation wholly owned by the United States is held without the advantages of § 3466. Sloan Shipyards *v.* U. S. Fleet Corporation, 258 U. S. 549, 570.

[6] Cf. Wagner *v.* McDonald, 96 F. (2d) 273, 274; In re Dickson's Estate, 84 P. (2d) 661, 664; DuPont de Nemours & Co. *v.* Davis, 264 U. S. 456; Clallam County *v.* United States, 263 U. S. 341; North Dakota-Montana Wheat Growers Ass'n *v.* United States, 66 F. (2d) 573, 576-577.

[7] This is not in accord with the practice under Title I of the National Housing Act. The act is administered so as to create an insurance reserve for each approved financial institution of not to exceed the authorized percentage of the total amount of qualified paper. Cf. Regulations, Federal Housing Administration, Property Improvement Loans, 3 Federal Register 358, regulation number 17.

[8] "The question of the financial condition of the borrower is left to the reasonable judgment of the insured institution as a credit matter. The borrower must furnish the lending institution a financial or credit statement, approved as to form by the Administrator, which in the judgment of the insured institution shows the borrower to be solvent, with reasonable ability to pay the obligation and in other respects a reasonable credit risk in view of the insurance provided by the National Housing Act."

form of credit statement from the note maker to the bank in use, presumably, at the time of the loan. The form contains this sentence, as well as information as to the applicant's employment or business, his income and the property to be improved: "The following information is given for the purpose of inducing you to grant credit under the provisions of Title I of the National Housing Act."

The regulation and the credit statement certainly do not supply the facts necessary to the conclusion that this particular form of credit statement was used. As the certificate does not show the State in which the note was executed, payable or enforceable, we are left to speculate as to the applicable law of indemnity. It is not clear that a voluntary guarantor can recover in every jurisdiction from the involuntary principal who has not requested the service.[9] But even if we assume that such a guarantor may recover upon an implied promise of reimbursement, the rule is not effective here. The statement of the case and the question certified show that the claim in bankruptcy of the Government is based upon the note, duly assigned to it after bankruptcy. As no proof was made of any claim for reimbursement, such a claim is not involved.[10]

The claim on the note, assigned to the United States subsequently to the maker's bankruptcy, has priority, if at all, by virtue of the general provisions of Section 3466, as recognized by Section 64(b)(7) of the Bankruptcy Act.[11] That subdivision granted priority ahead of dividends to creditors, to claims entitled to priority under the laws of the United States. Priority has been secured to the United States in varying language throughout its history.[12] The tendency has been to interpret these provisions

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[9] Cf. Leslie *v.* Compton, 103 Kan. 92; Marsh *v.* Hayford, 30 Me. 97; McPherson *v.* Meek, 30 Mo. 345.

[10] Cf. Insley *v.* Garside, 121 F. 699, 702. Cf. also Sec. 57(i) which provides that "Whenever a creditor whose claim against a bankrupt estate is secured by the individual undertaking of any person fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor." Act of July 1, 1898, c. 541, § 57, 30 Stat. 560, 11 U. S. C. § 93.

[11] See note 3, *supra.*

[12] The Government summarizes the legislative background as follows: "The Act of July 31, 1789, Sec. 21, c. 5, 1 Stat. 29, 42, first gave the United States priority but was limited to debts due on bonds for duties. The Act of May 2, 1792, Sec. 18, c. 27, 1 Stat. 259, 263, allowed sureties who paid their debts to the United States to exercise their priority. The Act of March 3, 1797, Sec. 5, c. 20, 1 Stat. 512, 515, extended the priority to all debts due from any person. The Act of March 2, 1799, Sec. 65, c. 22, 1 Stat. 627, 676, applied to bonds for duties. R. S., Sec. 3466 is derived from the Acts of 1797 and 1799."

liberally to secure the advantage sought by the Congress.[13] "As this statute has reference to the public good it ought to be liberally construed."[14] It has been said that "nothing else appearing" even claims under the railroad Federal Control Act would be entitled to priority.[15] But this principle of construction is subject to the limitation that the generality of the language of the section is restricted by the purpose to grant priority to the United States, only, and by legislative intention, as shown by other statutes. Consequently priority was refused to corporations wholly owned by the United States[16] and to the Director General of Railroads because section 10 of the Federal Control Act manifested an intention that the carriers under federal control should be treated as before their transfer to federal operation.[17] The United States itself when it sought priority for its loans under the Transportation Act was denied the benefits of Section 3466 because the intention to build up the credit standing of the railroads was inconsistent with the claimed priority.[18]

We are of the view that Section 3466 is inapplicable to general claims in bankruptcy transferred to the United States, or to which it has become subrogated on payment, after the filing of the petition for the reason that the rights of creditors are fixed by the Bankruptcy Act as of the filing of the petition in bankruptcy. This is true both as to the bankrupt and among themselves.[19] The assets

[13] United States *v.* Fisher, 2 Cranch 358; Harrison *v.* Sterry, 5 Cranch 289, 298-299; United States *v.* State Bank of North Carolina, 6 Pet. 29, 35; Beaston *v.* Farmers' Bank, 12 Pet. 102, 134; Lewis, Trustee *v.* United States, 92 U. S. 618, 621; Bramwell *v.* United States Fidelity & Guaranty Co., 269 U. S. 483, 487; Price *v.* United States, 269 U. S. 492, 500.

[14] Beaston *v.* Farmers' Bank, *supra*.

[15] Mellon *v.* Michigan Trust Co., 271 U. S. 236, 239.

[16] Sloan Shipyards *v.* U. S. Fleet Corporation, 258 U. S. 549, 570. Even though private parties might have participated in stock ownership under the law. See p. 565.

[17] Mellon *v.* Michigan Trust Co., *supra*, 240.

[18] United States *v.* Guaranty Trust Co., 280 U. S. 478, 485-86.

[19] White *v.* Stump, 266 U. S. 310, 313; In re C. H. Earle, Inc., 2 F. Supp. 15, affirmed on the opinion below 65 F. (2d) 1013. Cf. Spokane County *v.* United States, 279 U. S. 80, 93; United States *v.* Oklahoma, 261 U. S. 253, 260, as to receivership proceedings.

The lower courts have divided upon the issue whether a Federal Housing Administration claim is entitled to priority. Priority has been given in Wagner *v.* McDonald, 96 F. (2d) 273; In re Wilson, 23 F. Supp. 236; In re T. N. Wilson, Inc., 24 F. Supp. 651; cf. In re Dickson's Estate, 84 P. 2d 661. Priority has been denied in In re Hansen Bakeries, Inc., C. C. A. 3, Jan. 27, 1939 (unreported); Federal Housing Administrator *v.* Moore, 90 F.

at that time are segregated for the benefit of creditors.[20] The transfer of the assets to someone for application to "the debts of the insolvent, as the rights and priorities of creditors may be made to appear,"[21] takes place as of that time.

The question certified should therefore be answered in the negative.

It is so ordered.

The Chief Justice and Mr. Justice DOUGLAS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

(2d) 32; In re Stamford Auto Supply Co., 25 F. Supp. 530; In re Miller, 25 F. Supp. 336; cf. Paul v. Paul Lighting Fixture Co., 13 Oh. L. Rep. 27. The assignment was made prior to bankruptcy or insolvency in the Wagner and Dickson cases. In the Wilson and T. N. Wilson, Inc., cases the time of assignment is uncertain. In the remaining cases it came after bankruptcy or insolvency.

[20] Mueller v. Nugent, 184 U. S. 1, 14; May v. Henderson, 268 U. S. 111, 117.

[21] Bramwell v. United States Fidelity & Guaranty Co., 269 U. S. 483, 490.